

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

XL ENTERPRISES, t/a U.S. TOXIC SUBSTANCE TESTING BUREAU	:	CIVIL ACTION
	:	
	:	
	:	
	:	
v.	:	
	:	
CENDANT MOBILITY SERVICES CORP.	:	NO. 99-3186
	:	
Newcomer, J.		December , 1999

**M E M O R A N D U M**

Presently before this Court is defendant's Motion for Summary Judgment and plaintiff's response thereto. For the reasons that follow, defendant's Motion will be DENIED.

**I. FACTUAL BACKGROUND**

Plaintiff, U.S. Toxic Substance Testing Bureau ("U.S. Toxic") is based in Bucks County, Pennsylvania and performs home inspections, radon testing, environmental testing, and various other testing services on homes for the relocation industry. Defendant, Cendant Mobility Services Corporation (previously known as PHH Relocation)("PHH"), is an international relocation company that provides appraisal and inspection services to its clients for the relocation of the clients' employees. As part of its relocation services, PHH obtains home inspections and environmental tests from companies like U.S. Toxic.

This action arises out of a business relationship between the parties in which plaintiff was the primary provider of inspection services for defendant. In 1984, PHH began referring home inspection and environmental testing work to U.S. Toxic, which U.S. Toxic performed or subcontracted to other inspection

companies. From the period of 1984 until 1995, defendant was plaintiff's only client. However, at no time during the ongoing relationship was there any written agreement or contract for services.

In the mid to late-1980s, PHH began focusing on a company-wide strategy to encourage the use of minority and women owned businesses in all aspects of the relocation process, from inspections to appraisals to closings to transportation. Included within the strategy were specific efforts for utilizing minority and women owned businesses with PHH's work with governmental agencies. In 1993 or 1994, PHH approached U.S. Toxic to discuss the use of minority and women owned inspection businesses, and U.S. Toxic agreed to encouraging the use of minority and women owned businesses. In 1995, U.S. Toxic and PHH collaborated on a program to encourage, and increase the amount of, minorities and women into the inspection field. The result of this was the "Minority Opportunities in Real Estate" or "MORE" program.

Under this program, U.S. Toxic was responsible for locating and training qualified minority and women owned businesses to perform home inspections and radon tests. U.S. Toxic argues that in return, PHH promised to provide the trainees with inspection testing work. Additionally, U.S. Toxic alleges that PHH promised they would direct an amount of inspection and testing work to U.S. Toxic that exceeded the amount of business it was already

receiving at that time. PHH, however, contends they made no such guarantees.

After implementation of the MORE program, the amount of business plaintiff received from defendant gradually decreased. Instead of an increase in business, as PHH allegedly promised, U.S. Toxic suffered a decrease. During this period, however, U.S. Toxic contends that PHH consistently made reassurances that the MORE program would be successful, and the volume of work would increase. On March 27, 1997, parties from both corporations met to discuss the situation at hand, and how it could be rectified. Plaintiff alleges that it hoped to obtain the promised work and continue its relationship with defendant. Instead, on July 7, 1997, after conducting an investigation, defendant sent plaintiff a letter indicating its wishes to terminate its relationship with plaintiff.

Plaintiff brought suit in June 1999 for claims of breach of contract, unjust enrichment, fraudulent inducement, negligent misrepresentation, and intentional misrepresentation. Defendant now moves this Court for summary judgment, asserting that the claims must be dismissed as a matter of law due to a lack of evidence to support plaintiff's case.

## **II. DISCUSSION**

### **A. SUMMARY JUDGMENT STANDARD**

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse

Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

**B. STATUTE OF LIMITATIONS**

Defendant argues that plaintiff's claims of negligent and intentional misrepresentation and fraudulent inducement should be dismissed because the two year statute of limitations period for tort actions has run. 42 Pa. Cons. Stat. Ann. §5524(7)(Supp. 1999). PHH contends that the right to institute this suit began when plaintiff began to notice the decrease in business from PHH, which took place as early as August 1996. Defendant argues that plaintiff should have been aware of the potential tort suit at that time, thus triggering the statute of limitations, which should have ended in 1998. Thus, defendant concludes that plaintiff should be barred from bringing his tort claims which were filed June 1999.

Plaintiff defends against defendant's statute of limitations argument by relying on the fraudulent concealment doctrine, and the argument that the statute of limitations is tolled when it would be impractical and self-defeating for a plaintiff to file an action against a defendant providing continuous help to the plaintiff.

Generally, the statute of limitations begins to run once the plaintiff has discovered his injury, or, in the exercise of reasonable diligence, should have discovered his injury. See Cathart v. Keene indus. Insulation, 471 A.2d 493, 500 (1984). However, Pennsylvania courts have developed the doctrine of

fraudulent concealment which tolls the statute of limitations where "through fraud or concealment the defendant causes the plaintiff to relax his or her vigilance or deviate from the right of inquiry." Ciccarelli v. Carey Can. Mines, Ltd., 757 F.2d 548, 556 (3d Cir. 1985). Fraudulent concealment may be intentional or unintentional, but "mere mistake, misunderstanding, or lack of knowledge is insufficient." Bohus v. Beloff, 950 F.2d 919, 925 (3d Cir. 1991)(quoting Nesbitt v. Erie Coach Co., 204 A.2d 473 (1964)). Furthermore, there must be an affirmative and independent act of concealment that would divert or mislead the plaintiff from discovering the injury. Id.

Plaintiff argues that the statute of limitations period should be tolled because it was not aware of PHH's alleged fraud or deceit until July 7, 1997, when U.S. Toxic received word that defendant was formally terminating the parties' business relationship. Plaintiff contends that defendant's officers gave repeated reassurances to plaintiff that led U.S. Toxic to believe that legal action was unnecessary. Plaintiff relies on the deposition testimony of its officers who indicate that they believed that defendant was going to make efforts to remedy the lack of business brought to the plaintiff. These officers believed that defendant was trying to bring forth more business, as corroborated by a letter sent before their final meeting with defendant indicating plaintiff's willingness and hope to continue business with defendant. Up until the very end of the parties'

relationship, plaintiff's officers believed the defendant would make a concerted effort to carry through with its alleged promises. Plaintiff argues that they were lulled into complacency until their relationship with defendant was severed.

Whether the statute of limitations has run on a claim is generally a question of law for this Court; however, it has been held that at times a factual determination by the jury may be required. See Cathart, 471 A.2d at 500. In Bohus, the court held that the determination of whether a plaintiff exercised reasonable diligence is usually a jury question, which necessarily means it is a question which cannot be decided through summary judgment. Bohus, 950 F.2d at 925.

This Court finds that plaintiff's evidence, when read in the light most favorable to plaintiff, is sufficient to show defendant's fraudulent concealment. Plaintiff raises genuine issues of material fact as to whether defendant misled plaintiff and when plaintiff should have discovered its injuries. Tolling the statute of limitations is therefore appropriate in the instance case. This Court reserves the determination of whether plaintiff exercised reasonable diligence in discovering its injuries for a jury and denies defendant's Motion for Summary Judgment as to the statute of limitations argument.

**C. EXISTENCE OF A CONTRACT**

Defendant's second argument for summary judgment is that the lack of an oral contract bars plaintiff's contractual claim.

Defendant claims that there was no contract between the parties, and therefore the breach of contract and unjust enrichment claims must be dismissed. Alternatively, defendant argues that even assuming the existence of an agreement between the parties, the statute of frauds is applicable to bar recovery by the plaintiff due to the lack of a written agreement.

Plaintiff admits that there is no written agreement relating the alleged obligations of the parties with regard to the MORE program, but argues that the record demonstrates that a jury could find that a contract existed between the parties and thus the issues regarding the existence of a contract should go to a jury. Moreover, plaintiff argues that Pennsylvania's statute of frauds does not contain a provision for oral contracts incapable of performance within one year, and thus the statute of frauds does not apply to the instant case.

In order to determine whether plaintiff survives summary judgment, this Court must now determine whether the facts, when viewed in the light most favorable to plaintiff, establish the existence of an oral contract. "The burden of proving the existence of a contract lies with the party seeking to establish it." Geiger Associates Plumbing, Heating & Air Conditioning, Inc. v. Geiger Services, Inc., No. CIV.A. 98-1315, 1998 WL 242598, \*1 (E.D. Pa. May 14, 1998)(citing Boyle v. Steiman, 631 A.2d 1025, 1033 (1993)). Under Pennsylvania law, plaintiffs must present "'clear and precise' evidence" of an oral contract by which both

parties "manifested an intent to be bound," for which both parties gave consideration, and which contains "sufficiently definite" terms. Martin v. Safeguard Scientifics, Inc., 17 F.Supp.2d 357, 368 (E.D. Pa. 1998) (quoting Browne v. Maxfield, 663 F.Supp. 1193, 1197 (E.D. Pa. 1987), and Gorwara v. AEL Indus., Inc., 784 F.Supp. 239, 242 (E.D. Pa.1992)). Consideration confers a benefit upon the promisor or causes a detriment to the promisee and must be an act, forbearance or return promise bargained for and given in exchange for the original promise. Channel Home Centers, Div. of Grace Retail Corp. v. Grossman, 795 F.2d 291, 298-99 (3d Cir. 1986)(citations omitted). In addition, "a contract must represent a meeting of the parties' minds on the essential elements of their agreement." Courier Times, Inc. v. United Feature Syndicate, Inc., 445 A.2d 1288, 1295 (Pa. Super. Ct. 1982); see also Degenhardt v. The Dillon Co., 669 A.2d 946, 950 (Pa. 1996) (finding that the "formation of a valid contract requires the mutual assent of the contracting parties"). When there is conflicting evidence regarding intent, the question whether the parties formed a completed contract is one for the trier of fact. Field v. Golden Triangle Broad., Inc., 305 A.2d 689, 691-92 (Pa. 1973), cert. denied, 414 U.S. 1158 (1974).

Defendant argues that the question whether terms are "clear and precise" is an issue of law to be determined by the Court, and that in the instant case there is a complete lack of specificity. To support this contention defendant cites National Data Payment Systems v. Meridian Bank, 18 F.Supp. 2d 543 (E.D. Pa.

1998). However, that case deals with a written agreement, rather than an oral contract, which is the agreement in contention in this case. Plaintiff cites Prime Bldg. Corp. v. Itron, Inc., 22 F.Supp. 2d 440 (E.D. Pa. 1998), which states that in the case of a disputed oral contract, "what was said and done by the parties, as well as what was intended . . . are questions of fact to be resolved by the trier of fact." Prime Bldg. Corp., 22 F.Supp. 2d at 444 (quoting Johnston the Florist, Inc. v. TEDCO Const. Corp., 657 A.2d 511, 516 (1995)). This Court agrees with plaintiff that the determination of factual disputes regarding what was said, what was done and the intentions of each party must go the jury with instructions that the evidence must be "clear and precise" to establish an oral contract.

In the instant case, factual disputes exist as to the parties' intentions as well as what was said, promised, and done. Defendant argues that the nature of the parties' ongoing relationship belies the existence of a contract. Even if an agreement had been made, defendant argues that the lack of specificity with regards to the specific amounts and type of work as well as dollar amounts demonstrates the lack of any meeting of the minds by the parties. Defendant also contends that no contract exists because there is a lack of consideration. Defendant asserts that they provided work to plaintiff both before and after implementation of the MORE program. Additionally, defendant says they utilized minority and women owned businesses both before and

after the MORE program, and therefore there was no new consideration. Finally, defendant posits that there were outside influences and factors which impacted the overall volume of work ultimately given out by PHH, and that these factors were not related to the MORE Program. Defendant claims that plaintiff's assertions that the decrease in the volume of work was only related to the MORE Program, when in fact that decrease was experienced by others and had unrelated causes, is unfair.

In arguing that a valid contract was made, plaintiff argues that the record shows sufficient evidence of the intentions, sufficiency of terms, and consideration necessary to find that a contract existed. Plaintiff relies on deposition testimony as well as various correspondences in alleging that defendant gave plaintiff assurances of work in exchange for U.S. Toxic's agreement to partner in the MORE Program. Plaintiff contends that such representations led plaintiff to believe that defendant intended to enter an agreement. Plaintiff also contends that the agreement was made with sufficient specificity because defendant promised to provide U.S. Toxic with at least \$1,600,000 in home inspection and environmental testing work and all of the work in the MORE areas for as long as defendant used the program.

In showing evidence of consideration, plaintiff points to deposition testimony which suggests defendant would in fact benefit from the implementation of the MORE Program. Plaintiff contends that defendant benefitted from the MORE program because

the program provided defendant with increased minority owned business usage and helped it to comply with government and private relocation contracts. Plaintiff also points to depositions of defendant's officers who stated defendant was having difficulties finding minority and women owned inspectors prior to the MORE program. Again, this is further evidence that defendant did benefit from the supposed agreement between the parties. Plaintiff, of course, contends they were to benefit from the agreement through an increase in business.

This Court finds the evidence produced by plaintiff, when read in the light most favorable to plaintiff, shows that an oral contract existed. Because plaintiff has produced evidence that raises genuine issues of material facts as to whether an oral contract existed between the parties this Court determines that the evidence presented by both sides should be presented to a jury.

Defendant also argues that the claim for unjust enrichment should be dismissed because there is no basis for an unjust enrichment claim without a contractual relationship. Plaintiff argues that it legitimately brings the claim for unjust enrichment as an alternative claim to the breach of contract claim, as provided for in Federal Rule of Civil Procedure 8(e)(2). To secure an unjust enrichment claim a party must show that "the party against whom recovery is sought either wrongfully secured or passively received a benefit that would be unconscionable for the

party to retain without compensating the provider." Curtin v. Star Editorial, Inc., 2 F.Supp.2d 670, 674 (E.D. Pa. 1998).

Again, defendant claims it received no benefit from any arrangements with plaintiff, and that plaintiff was compensated for its efforts in each instance for work performed by an inspection subcontractor. Plaintiff counters, once again, by pointing to deposition testimony that indicates defendant's benefit was through the success of the MORE Program. Additionally, plaintiff argues that the compensation plaintiff received was neither commensurate with, nor in response to, their efforts behind the MORE program.

This Court finds that plaintiff has produced sufficient evidence of unjust enrichment to raise genuine issues of material fact. Insofar as the issues concerning the existence of an oral contract must go before a jury, so must the factual disputes concerning unjust enrichment. Moreover, defendant misstates the Court's holding in Curtin v. Star Editorial, Inc., 2 F.Supp.2d 670 (E.D. Pa. 1998), which actually held: "[w]here a direct contractual relationship exists between the parties, no basis for an unjust enrichment exists." Id. at 674. Regardless, this Court denies defendant's Motion to dismiss the unjust enrichment claim.

Defendant makes one final argument that the contract claims must be dismissed because there was no contract in writing. To support this argument, PHH cites the general statute of frauds rule which requires all agreements which do not take place within one year to be in writing. Calamari and Perillo, Contracts 2d Ed.,

§19-7 (1981). This rule, however, is not applicable in Pennsylvania, where the "Pennsylvania Statute of Frauds does not contain a provision for agreements that cannot be performed within one year." Hornyak v. Sell, 427 Pa.Super 356, 361 (1993). Therefore, defendants argument in this instance is also dismissed.

**O R D E R**

AND NOW, this        day of December, 1999, upon  
consideration of Motion for Summary Judgment of Defendant Cendant  
Mobility Services Corp., and plaintiff's response thereto, it is  
hereby ORDERED that said Motion is DENIED.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.